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Raymond J. Rasenberger

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## CONTROL OF AN AIR CARRIER BY “ANY OTHER PERSON”—FLYING BLIND UNDER THE FEDERAL AVIATION ACT

RAYMOND J. RASENBERGER\*

*Prompted by the ever-growing trend toward acquisition of diversified business economic interests by single-corporate entities, Congress recently amended the Federal Aviation Act making it unlawful for any person to acquire a controlling interest in an air carrier without approval of the Civil Aeronautics Board. Prior to the amendment any noncarrier or person not engaged in aeronautics attempting to acquire control of an air carrier could do so without CAB approval so long as control was sought without a technical transfer of the air carrier's certificate. Mr. Rasenberger's article takes issue with the amendment for creating more problems than it solved. Noting that the legislation conferred unnecessarily broad powers upon the CAB, he suggests guidelines for persons acquiring a substantial stock interest or otherwise assuming an influential relationship with an airline. The article concludes by suggesting the sensible approach to the new statute.*

ON AUGUST 20, 1969, President Nixon signed Public Law 91-62,<sup>1</sup> making it unlawful for any person to acquire control of an air carrier<sup>2</sup> without approval of the Civil Aeronautics Board. This legislation, hastily conceived and quickly enacted, established, but did not illuminate, a broad new area of regulatory jurisdiction. In the process new and significant hazards were created for those acquiring a substantial stock interest in an airline, or acquiring substantial influence through other business or financial relationships.

The legislative history suggests that neither the Congress nor the ex-

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\* A.B., Dartmouth College; A.M., Syracuse University; J.D., George Washington University. Member of the District of Columbia and Virginia Bars. The author gratefully acknowledges the valuable assistance and counsel of his partners Jerrold Scoutt, Jr., and John H. Quinn, Jr., in preparation of this article, and the assistance of William E. Donnelly, III with research and editing.

<sup>1</sup> Pub. L. No. 91-62, 83 Stat. 103 (Aug. 20, 1969). 49 U.S.C. §§ 1377, 1378 (1964), as amended (Supp. V, 1969).

<sup>2</sup> “Air carrier,” as used in the Federal Aviation Act, is a citizen that engages in air transportation. 49 U.S.C. § 1301 (3) (1964). “Air transportation” means the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft and encompasses “interstate,” “overseas,” and “foreign” air transportation. 49 U.S.C. §§ 1301(10), (21) (1964).

ecutive agencies had any idea of the uncertainties this law would introduce into the financial aspects of airline operation. The uncertainties have not since been dispelled. There have been few decided cases and no interpretative guidelines. The purpose of this article is to point out some of the pitfalls of this uncharted legislative territory and to suggest steps that can be taken as a guide for those who must venture into it.

#### A. Background: Section 408—Old and New

Public Law 91-62 was the first major amendment to section 408 of the Federal Aviation Act in its thirty year history.<sup>3</sup> Prior to the 1969 amendment, section 408(a)(5) prohibited common control relationships involving two or more air carriers, an air carrier and another common carrier, or an air carrier and a person engaged in a phase of aeronautics, unless approved by the CAB;<sup>4</sup> section 408(b) set forth standards and procedures for such approval. The legislative history makes clear<sup>5</sup> that the section was first enacted to assure adequate supervision of possible anti-competitive activities in air transportation and to prevent

<sup>3</sup> The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1964), is a reenactment of the original Civil Aeronautics Act of 1938. The only amendment to 49 U.S.C. § 1378 (1964) between 1938 and 1968 was the addition of a third proviso to § 408(b) in 1960, providing for non-hearing procedures in the case of uncontested acquisitions of control. See note 92 *infra*.

<sup>4</sup> Section 408(a), prior to amendment by Pub. L. No. 91-62, read as follows:

It shall be unlawful unless approved by order of the Board as provided in this section

(1) For two or more air carriers, or for any air carrier and any other common or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, or any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

49 U.S.C. § 1378 (1964).

<sup>5</sup> For discussion of the statutory antecedents and legislative history of § 408, see Allen, *Section 408 of the Federal Aviation Act: A Study in Agency Law-Making*, 45 VA. L. REV. 1073, 1077-82 (1959).

possible domination of the then infant air transportation industry by more powerful surface transportation interests.

Thirty years of Board decisions under section 408 reflect a scrupulous adherence to the statutory purposes. Control relationships involving two or more air carriers have been approved only under unusual circumstances.<sup>6</sup> The term "phase of aeronautics" has been given wide-sweep,<sup>7</sup> and even though the original concern about domination of air carriers by surface carriers is obsolete, such relationships have been tightly constrained.<sup>8</sup>

In deciding whether control exists, moreover, the Board has refused to elevate form over substance. The term "control" has been broadly and flexibly defined;<sup>9</sup> the Board has extended its writ under section 408

<sup>6</sup> Such approvals have been granted when the Board found no significant conflict of interest between the two air carriers. *See, e.g.*, Capitol Airways, Inc., C.A.B. Order No. 68-12-73 (Dec. 13, 1968) (control of air taxi by supplemental air carrier); Continental—Air Micronesia, C.A.B. Order No. E-24762 (Feb. 17, 1967) (control by trunk carrier of air carrier restricted to air transportation pursuant to contract with trust territory); San Francisco and Oakland Helicopter Airlines, Inc., C.A.B. Order No. E-24800 (Mar. 1, 1967); New York Airways, Inc., C.A.B. Order No. E-23714 (May 20, 1966); and Los Angeles Airways, Inc., C.A.B. Order No. E-23268 (Feb. 17, 1966) all involved control by trunk carriers of helicopter carriers in financial distress. In these and a few other instances when one carrier was in financial distress, common control has been approved on an interim basis subject to extensive conditions restricting transactions. *See* Caribbean Atlantic Airlines, Inc., C.A.B. Order No. 70-11-142 (Nov. 27, 1970); American Airlines, Inc. and Trans Caribbean Airways, Inc., C.A.B. Order No. 70-12-108 (Feb. 25, 1970); Hughes Tool Co., C.A.B. Order No. 69-113 (Mar. 28, 1969).

<sup>7</sup> *See, e.g.*, Trans World Airlines, Inc., C.A.B. Order No. E-25929 (Nov. 6, 1967); (Bank participating in lease of aircraft); Flying Tiger Line, Inc., C.A.B. Order No. E-24030 (Aug. 2, 1966) (private carrier between foreign points); North Central Airlines, Inc., C.A.B. Order No. E-13215 (Nov. 28, 1958) (aircraft dealer); Flight Enterprises, Inc.—Transocean Corp., 27 C.A.B. 562 (1958) (company selling and pumping aircraft fuel); Clyde W. Sorrel, C.A.B. Order No. E-12891 (Aug. 14, 1958) (manufacturer with less than 1% of its sales to commercial airlines); Frank V. Gandola, 24 C.A.B. 592 (1957) (travel agent); Wm. Littlewood, C.A.B. Order No. E-7855 (Oct. 29, 1953) (aeronautical research laboratory); Atlas Corp., Control of Consolidated Vultee, 9 C.A.B. 921 (1948) (manufacturer of aircraft parts).

<sup>8</sup> When the applicant is a carrier other than an air carrier, the second proviso in § 408(b) imposes the added requirement that the applicant must be able to show that the transaction will promote the public interest by enabling it to use aircraft to public advantage in its operation, and that this will not restrain competition. Following a reversal in *Pan American Airways v. C.A.B.*, 121 F.2d 810 (2d Cir. 1941), the Board adopted, as the test of compliance with the second proviso, the rule that the air carrier's services must be "auxiliary and supplemental" to those of the "other common carrier." *American Export Airlines*, 3 C.A.B. 619, 624 (1942), *aff'd* 4 C.A.B. 104 (1943). *See also* *Railroad Control of Northeast Airlines*, 4 C.A.B. 379, 381 (1943). This follows a similar approach by the ICC, *cf. Pennsylvania Truck Lines*, 1 M.C.C. 101, 113 (1936), 5 M.C.C. 9, 11-12 (1937). There has been some relaxation of the Board's views in recent years. *See* *TWA Acquisition of Sun Line*, C.A.B. Order No. 71-1-4 (Jan. 4, 1971); *Transamerica Corp.*, C.A.B. Order No. 70-9-54 (Sept. 10, 1970); *Motor Carrier Air Freight Forwarder Investigation*, C.A.B. Order No. 69-4-100, (Apr. 21, 1969), *aff'd sub nom ABC Air Freight v. C.A.B.*, 419 F.2d 154 (2d Cir.), *cert. denied*, 397 U.S. 1006 (1969). However, the Board's interpretation of the second proviso has effectively barred any significant intermodal control involving a direct air carrier.

<sup>9</sup> In an early statement that is often cited, the Board declared:

The decisions of the courts support the view that 'control' as used in sec-

into the nooks and crannies of numerous business and financial relationships.

Public Law 91-62 made important changes. It amended section 408(a)(5) to include acquisitions by "any other person." It added a proviso, however, allowing the Board to approve the acquisition of non-certificated carriers by exemption, *i.e.*, without hearing.<sup>10</sup> In addition, section 408(f)<sup>11</sup> was added making ownership of ten percent of an air carrier's stock presumptive control.

Although described as merely "closing a loophole,"<sup>12</sup> these changes do substantially more. Prior to Public Law 91-62, the statute did not conceive of air transportation as an exception to the ordinary right of persons to engage in lawful businesses of their own choosing. Only in the case of control by related businesses or other carriers, when anticompetitive activities might threaten the Act's broad developmental objectives, did Congress assert a regulatory interest. The new language makes the exception into the rule. *No one* is free to acquire control of an air carrier without the scrutiny of the CAB. In addition, under a broad "public interest" test, the Board may assert the power to determine what types of

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tion 408 does not necessarily depend upon the ownership of any specific minimum percentage of stock or other ownership rights but rather depends, in light of all the facts and circumstances in a particular case, upon whether there exists as a matter of fact a power to dominate or an actual domination of one legal personality by another.

Railroad Control of Northeast Airlines, 4 C.A.B. 379, 381 (1943).

<sup>10</sup> 49 U.S.C. § 1378(a)(5) (1964), *as amended*, (Supp. V, 1969) provides that it shall be unlawful, unless approved by order of the Board:

For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided, That the Board may by order exempt any such acquisition of non-certificated air carrier from this requirement to the extent and for such periods as may be in the public interest; . . .* (emphasis added to new language).

<sup>11</sup> Subsection 408(f), 49 U.S.C. § 1378 (1964), *as amended*, (Supp. V, 1969) provides as follows:

For the purposes of this section, any person owning beneficially 10 per centum or more of the voting securities or capital, as the case may be, of an air carrier shall be presumed to be in control of such air carrier unless the Board finds otherwise. As used herein, beneficial ownership of 10 per centum of the voting securities of a carrier means ownership of such amount of its outstanding voting securities as entitles the holder thereof to cast 10 per centum of the aggregate votes which the holders of all outstanding voting securities of such carrier are entitled to cast.

Pub. L. 91-62 also enlarged disclosure requirements under 49 U.S.C. § 1377(b) (1964) to require reports at least annually by holders of at least 5% or more of a class of an air carrier's capital stock. See 49 U.S.C. § 1377(b) (1964), *as amended*, (Supp. V, 1969).

<sup>12</sup> *Hearings on H.R. 8261, 8322, 8323, Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce*, 91st Congress, 1st Sess. 5 (1969) [hereinafter referred to as *House Hearings*]; *Hearings on S. 1373 Before the Comm. on Commerce*, 91st Congress, 1st Sess. 63 (1969) [hereinafter referred to as *Senate Hearings*].

people will be allowed to control airlines, and to examine whatever factors, including business ability, character, motives and personal habits, it deems pertinent.

This fundamental change was enacted by Congress less than six months after the first bill was introduced.<sup>13</sup> The legislative history does not entirely explain the unusual speed, but it does provide insight into the Congressional purposes. Numerous references to a threatened takeover bid for Pan American World Airways by Resorts International, a conglomerate with alleged gambling interests in the Bahamas, are made throughout the hearings and floor debates.<sup>14</sup> Another carrier, Western Airlines, also faced a takeover by an outsider.<sup>15</sup> Further, the legislative history evidences a general concern about the spread of conglomerates into regulated industries.<sup>16</sup>

The proposed legislation enjoyed widespread support, not only from the airline industry,<sup>17</sup> but also from the interested governmental agencies,<sup>18</sup> which concurred with the broadened jurisdiction although with some reservations about the form finally enacted. No one appeared at the hearings to oppose the bills,<sup>19</sup> and only one voice is recorded as opposed in each House.<sup>20</sup>

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<sup>13</sup> H.R. No. 8261 was introduced on March 6, 1969, and S. No. 1373 on March 7.

<sup>14</sup> *Senate Hearings* 22-3, 26. On the House floor, Congressman Dingell saw the issue as a simple one: "The question is, Do we want gamblers moving in on a regulated industry? The answer is 'No'." 111 CONG. REC. 6042 (daily ed. July 17, 1969).

<sup>15</sup> *Senate Hearings* 96.

<sup>16</sup> See H.R. REP. NO. 91-261, 91st Cong., 1st Sess. 2 (1969); S. REP. NO. 91-185, 91st Cong., 1st Sess. 4 (1969). A year earlier, the conglomerate scare led to the enactment of Pub. L. 90-439, 15 U.S.C. § 78p (Supp. 1971), requiring disclosures by persons intending to acquire 10% or more of any class of equity securities registered under the Securities Exchange Act of 1934.

<sup>17</sup> *Senate Hearings* 56-7.

<sup>18</sup> See *House Hearings* 4, 9, 82 (remarks of CAB Chairman Crooker); *Senate Hearings* 82 (remarks of Asst. Secretary, Dept. of Transportation Paul W. Cherington); *Senate Hearings* 35 (remarks of SEC Chairman Budge); *House Hearings* 38 (remarks of SEC Commissioner Hugh F. Owens).

<sup>19</sup> Presumably, the views of airline stockholders were reflected by management's support of the legislation, although it is not clear that a stockholder's interest in restraining takeover bids is identical with that of management.

<sup>20</sup> In separate views attached to the Senate Committee Report, Senator Pearson objected because of the absence of more detailed criteria in the bill to guide the actions of the Board. This, he said, would be

... inviting a scope of inquiry by the Civil Aeronautics Board that may well be unconstitutional. An undisciplined inquiry as to whether a non-carrier person or entity is fit, willing, and able to operate an air carrier could well lead to determinations based upon personal whim or prejudice under guise of an inquiry related to the character, morals or good business sense of the acquiring party.

Relating to these objections is the situation which this law potentially creates. If any person seeks to acquire control of an air carrier and if differences of opinion exist between that person and the current management of that carrier, a likely result is that each of the opposing parties would come before the Board and make statements about the character

### B. Issues Involving Application of New Section 408

The immediate concerns that pushed Public Law 91-62 toward quick enactment have now receded. Pan American was not acquired by Resorts International and conglomerates generally have come upon harder times. The statute, however, is on the books and the penalties for a violation can be severe, including divestiture,<sup>21</sup> fines,<sup>22</sup> or even criminal prosecution.<sup>23</sup> It is therefore necessary that "other persons" who anticipate substantial financial, or other relationships with airlines understand the scope of the statute.

#### 1. *Will the Board view control by "any other person" by different standards than control by other carriers or phases of aeronautics?*

The language in revised section 408(a) treats control by "any other person" no differently than control by an air carrier, common carrier, or person engaged in a phase of aeronautics. Did Congress, despite the wording of the amendment, intend any distinctions? Are acquisitions by "any other person" intended to be judged by a different standard than other prohibited acquisitions? Does the ten percent presumption of section 408(f) apply with equal effect to those acquisitions formerly covered by the statute as well as those by "any other person"? In any case, what effect does the presumption have on the measure of what constitutes control?

These questions have not been presented to the Board, nor has it disclosed any effort to anticipate them. Thus, the answers, if any, require heavy reliance on the legislative history. What history there is provides little comfort for those who would have acquisitions by "other persons" judged by a different standard than acquisitions by another carrier or person engaged in a phase of aeronautics.

Of the several bills first introduced, H.R. 8261 and its companion

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of the other. I think the recent attempts at air carrier acquisition are excellent evidence of the type of situation which would evolve. I do not believe that a public hearing presenting the promises and counterpromises, the charges and countercharges of opposing parties will be productive of the public interest.

S. REP. NO. 91-185, 91st Cong., 1st Sess. 16 (1969). On the House floor, Congressman Rogers of Colorado opposed it as "a special bill for the benefit of Pan Am in order to keep the management in control and not let the stockholders run it." 115 CONG. REC. 6041 (daily ed. July 17, 1969).

<sup>21</sup> See *Sherman, Interlocking Relationships*, 15 C.A.B. 876 (1952); cf. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

<sup>22</sup> Violators "shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. If such violation is a continuing one, each day of such violation shall constitute a separate offense . . ." 49 U.S.C. § 1471(a)(1) (1964).

<sup>23</sup> Violators "shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than \$500, and for any subsequent offense to a fine of not more than \$2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense." 49 U.S.C. § 1472(a) (1964).

S. 1373, most resemble the enacted version. These bills would have amended section 408(a) (5) to cover acquisitions of control by all persons.<sup>24</sup> A new section 408(f) would have been included stating that "any person owning beneficially 5 per centum or more of the capital stock or capital of an air carrier shall be deemed to be in control of such air carrier unless the Board finds otherwise."

The CAB supported the legislative objective but had reservations about the method. As viewed by the Board, these bills would oblige it to determine the existence of control upon the facts of each case, regardless of the five percent presumption. Although this would have merely retained the then current practice of the Board, the continuation of that practice under the broadened jurisdiction troubled the agency. Chairman John Crooker of the Board pointed out:

The bills before the Committee do not make ownership of the stated percentage of stock proof of control, but rather create a presumption of control solely for the purpose of insuring scrutiny by the Board. A lesser percentage well might constitute control and, in such a situation, the Board would continue to be obligated under the bills before the Committee to determine whether an acquisition of control had in fact occurred.<sup>25</sup>

This determination of control on a case-by-case basis, as the Board pointed out on several occasions to both the House and Senate Committees, could result in procedural burdens and delays with adverse consequences to airline financing.<sup>26</sup>

For this reason, the Board advanced its own alternative bill that would drop the presumption and simply prohibit the acquisition of more than ten percent of a carrier's capital stock or capital, or an increase in prior holdings of more than five percent, without prior approval.<sup>27</sup> It also

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<sup>24</sup> This was accomplished by inserting the words "whether or not" between "person" and "controlling" in § 408(a)(5). See *supra* note 10.

<sup>25</sup> *House Hearings* 27.

<sup>26</sup> *E.g., House Hearings* 6:

[I]t is the Board's view that any remedial legislation should be so framed as to impose the minimum procedural burdens upon persons seeking to purchase airline stocks, and also so as to permit prompt approval by the Board where there is no basis for believing that the acquisition will be contrary to the public interest. Otherwise, the effect of extending the coverage of the act might be to hamper the air carriers in their financing programs, since roadblocks would be placed in the way of purchases of stock by large institutional investors such as mutual funds, insurance companies, and the like. Furthermore, proceedings of the nature now required by section 408 not only are expensive and protracted, but also have an unsettling effect upon the carriers' overall activities until their completion.

<sup>27</sup> The ten percent standard appeared in language suggested to the Senate Committee; *Senate Hearings* 11. When it appeared at the House hearings a week later, however, the Board left the percentage blank. It suggested in testimony that either five or ten percent would be acceptable, although a preference for the latter was indicated. *House Hearings* 8.



would have allowed the Board to approve any acquisition without hearing. In proposing this alternative, the Board pointed out that "[u]nder the modifications we propose, the Board would achieve the objectives of the bill with a minimum procedural burden and interference with carrier financing or stock transfers."<sup>28</sup>

When questioned by the committees, Board representatives acknowledged that their proposal would not reach a case of actual control based on less than the percent of ownership specified in the legislation.<sup>29</sup> However, the Board regarded this risk as small relative to the practical problems of requiring that control be determined according to the facts of each case. As Chairman Crooker pointed out: "... more certainty in percentage might be more desirable in the balance than the uncertainty of what does constitute control."<sup>30</sup>

A related concern about procedural burdens and delay of business transactions is reflected in the testimony of Assistant Secretary Cherington of the Department of Transportation:

It would be a mistake, in our judgment, however, to authorize or encourage the Board to engage in a boundless search for evidence relating to every conceivable pro or con that might be involved. Such an expansive inquiry could be used by the management of the to-be-acquired carrier to perpetuate its control, without regard to the likely actual effects on the carrier's transportation operations. In any event, it could lead to lengthy delays in the resolution of particular cases.<sup>31</sup>

These concerns about uncertainty and procedural delays did not draw a sympathetic response from the Committees. The hearings, and to a greater extent the Committee reports, reflect an uneasiness by the Committee members about any legislation that might fail to reach actual control under all possible circumstances.<sup>32</sup> The bill reported by the Senate Committee adopted a ten percent presumption instead of the five percent that was contained in S. 1373. However, it left the Board with the unwanted discretion to determine whether other circumstances, including ownership of less than ten percent might constitute control.<sup>33</sup>

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<sup>28</sup> *House Hearings* 7.

<sup>29</sup> *Senate Hearings* 21; *House Hearings* 10.

<sup>30</sup> *Senate Hearings* 26. These sentiments were shared by the C.A.B. General Counsel, Joseph Goldman: "[T]he persons engaging in the securities transactions have to know whether they need prior approval or not. So I'm not sure how you could implement a discretionary power related to prior approval." *Senate Hearings* 22.

<sup>31</sup> *House Hearings* 84.

<sup>32</sup> Senator Cotton observed, for example, during the hearings that "the present management of Pan American controls only 2 or 3 percent of its stock," and that the Board's proposed ten percent standard, "wouldn't be effective since it is my understanding that the stock held by Resorts International is more than 9 percent but less than 10 percent." *Senate Hearings* 23. The Senator's conclusion seems to be expressed in his comment that "it may be a little dangerous to establish any artificial percentage at all." *Senate Hearings* 19.

<sup>33</sup> S. REP. NO. 91-185, 91st Cong., 1st Sess. 14 (1969).

The Senate Committee did, however, provide for mitigation of procedural requirements with a proviso authorizing the Board to exempt "any acquisition . . . to the extent and for such periods as may be in the public interest."<sup>34</sup> In addition, the Senate Committee adopted the Board's suggestion that it be allowed to establish special procedures for approval.<sup>35</sup>

The House Committee rejected the Board's proposal in stronger terms. "There is no way," the Report stated, "that a particular percentage, whether it be 5, 10, or 15 percent, could be defined as actual control of any or all carriers."<sup>36</sup> After noting that the ten percent test used in section 408(f) was selected as "an arbitrary but useful yardstick," the report pointed out: "To make certain that the Board has sufficient power to look at all acquisitions, the Committee bill, as amended, is written in terms of acquisition of control in any manner whatsoever, which is intended to be more comprehensive than the Interstate Commerce Act, section 1(3)(b) language."<sup>37</sup>

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<sup>34</sup> The reasoning of the committee in providing for the exemption authority follows:

The Committee feels that it may prove to be inappropriate to require section 408 proceedings as a uniform prerequisite to acquisition of a controlling interest in any class or type of air carrier, and this legislation should not be utilized to unreasonably inhibit the financial security and growth of the smaller carriers. Accordingly, the committee has provided the Board with permissive authority to exempt from the prior approval requirement air taxis, air freight forwarders, smaller supplemental carriers, or any other air carrier if such exemption will be consistent with the objectives of the Federal Aviation Act, this legislation, and the public interest.

*Id.* at 2-3.

<sup>35</sup> The proviso reads: "Provided, further, that in any case in which an order of approval is required hereunder only by reason of the requirements of section 408(a)(5), the Board may enter such order pursuant to such procedures as it by regulation may prescribe." The Committee explained that:

When this provision is read in conjunction with the prior paragraph it is clear that the Board should not be unreasonably burdened by the requirement that all acquisitions of control be subject to the prior approval of the Board. Under the previous paragraphs the Board is empowered to exempt any acquisition from the prior approval requirement if such would be consistent with the public interest and the objectives of this bill. Additionally, this paragraph of the bill would allow the Board to adopt expediting procedures for consideration of acquisitions not so exempted when such procedures would be fair and equitable to all parties of interest.

*Id.* at 3.

<sup>36</sup> H.R. REP. NO. 91-261, 91st Cong., 1st Sess. 4 (1969).

<sup>37</sup> *Id.* The emphasis on "any manner whatsoever" is somewhat puzzling since the same words appeared in the statute prior to its amendment. The Interstate Commerce Act, 49 U.S.C. § 1(3)(b) (1964), provides, in part, that when reference is made to "control",

[S]uch reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

The House bill also limited the Board's procedural discretion much more than the Senate. An exemption power was included but limited to acquisitions of non-certificated air carriers. The proposed fourth proviso, permitting the CAB to establish special procedures, was not adopted at all.

The Committee bills were passed by the respective Houses without amendment. In conference, the principal disagreement concerned the scope of the Board's exemption authority. The Conference Report, after noting that the House version "did not authorize the Board to prescribe expedited procedures and dispense with an evidentiary hearing," adopted that version.<sup>38</sup>

It is difficult to read this history without concluding that Congress was less concerned about the procedural burdens than the possibility that some form of control might escape CAB review. Despite the adoption of the ten percent presumption, it appears that Congress had no intention of modifying the Board's traditional view of control as a question that can be determined only after examination of all the facts.<sup>39</sup> Thus, regardless of procedural burdens, expense, or delay, persons proposing to enter into a relationship that might, according to the Board's traditional views, constitute control must obtain prior approval. Moreover, the cases hold that, regardless of the percentage of ownership or intervening corporate entities, it will be up to the Board, not the affected party, to make the initial determination whether the relationship requires approval.<sup>40</sup> Those who enter into questionable

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<sup>38</sup> H.R. REP. NO. 91-426 (conference rep.), 91st Cong. 1st Sess. 3 (1969):

The substitute agreed to in conference follows the House version. The committee of conference felt that the exemption authority of the Board with respect to noncertificated carriers eliminated the possibility that the Board would be overburdened with hearings on acquisitions of control. In the case of certificated carriers, particularly the smaller supplementals, the committee of conference expects the Board to process any acquisition proceedings with all due speed.

<sup>39</sup> As viewed by the Senate Committee:

... a legal presumption of control is created by ownership of 10 percent or more of an air carrier, but that presumption would be rebuttable with the burden of proof in such a case on the party alleging lack of control. Conversely, ownership of less than 10 percent of an air carrier could not be presumed to be control by the Board, but that presumption could as well be overcome by proof to the contrary, such burden to be borne by the Board.

S. REP. NO. 91-185, 91st Cong., 1st Sess. 3 (1969).

<sup>40</sup> The Board has generally taken the position that persons involved in possible control relationships are not free to determine whether the Board has jurisdiction without reference to the Board itself. *See, e.g.,* Caledonian Airways, C.A.B. Order No. 70-5-113, 2 (May 25, 1970): "The instant application was properly filed since the Board has initial jurisdiction over the matter to determine whether the separate corporate entities should be recognized and thus whether or not the relationships come within the purview of section 408 of the Act."

*See also* West Coast Airlines, Inc., Enforcement Case, 42 C.A.B. 561, 563 (1965):

The examiner applied the legal precedents involved in voting trust cases,

relationships without either Board approval or a ruling that the Board will not assert jurisdiction do so at their peril.

What then is the significance of the section 408(f) presumption? Portions of legislative history indicate that the intent was to place the "burden of proof" on the applicant where more than ten percent was acquired, and on the Board where the ownership was less than ten percent. When a stock acquisition leads to holdings exceeding ten percent, the presumption may have significance in the sense of requiring more extensive proceedings.<sup>41</sup> On the other hand, when acquisitions result in less than a ten percent concentration, it is not at all clear how this theory would accomplish a real change from current practice. For example, the presumption could be interpreted as placing the burden of going forward with evidence on the Board in an evidentiary proceeding. However, the Board's staff already takes an active role in seeing that evidence necessary for a decision is adduced in such proceedings.<sup>42</sup>

If the presumption is given a more extreme interpretation, one which would excuse the parties from filing an application when less than ten percent is involved (thus placing the burden on the Board to bring control proceedings after the acquisition), its effect could be very significant. There are numerous means of control involving no stock ownership at all. However, for this very reason it is most unlikely that the Board would adopt such a view. In the final analysis, therefore, it appears that section 408(f) will assume a relatively insignificant role, serving as a "guidepost" that "merely raises the flag for the Board to look closely at the deal,"<sup>43</sup> but accomplishes no substantive change in the concept of control.

## 2. *What circumstances may constitute an acquisition of control by "any other person"?*

Since Public Law 91-62 appears to invoke the conventional tests

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and pointed out the difference between those in which the Board has approved a trust agreement submitted to it for approval to vindicate the public interest and an agreement designed to escape the Board's jurisdiction over the possible control relationship. He also found, as a matter of fact, under the peculiar circumstances of this case, that the voting trust would not prevent West Coast from exercising control.

We agree with both the examiner's findings of fact and conclusion of law with regard to the violation.

<sup>41</sup> See REA Holding Corp., C.A.B. Order No. 70-7-142 (July 30, 1967).

The Board has applied the presumption of § 408(a)(5) to acquisitions formerly covered by the statute, as well as acquisitions by "any other person." See, e.g., Georgia Highway, C.A.B. Order No. 70-4-85 (Apr. 17, 1970). In view of this, and the absence of any differentiation in the statute itself, § 408(f) will presumably be construed as applicable to both "old" and "new" acquisitions.

<sup>42</sup> Moreover, as a practical matter, questions concerning the burden of proof tend to have little significance in C.A.B. decisions, with the possible exception of enforcement actions.

<sup>43</sup> 115 CONG. REC. 6038 (daily ed. July 17, 1969) (remarks of Congressman Nelsen).

of control, it remains to consider, in light of the cases, what factors may bring a relationship involving "any other person" within possible reach of the CAB.

(a) *Stock Ownership*

The Board's historic view has been that control does not depend upon any specific minimum percentage of stock ownership.<sup>44</sup> There is every reason to assume that this view will be applied to acquisitions by "any other person." Presumably, the Board will continue to look at the realities rather than the formalities of ownership. Indirect ownership will be examined as carefully as direct,<sup>45</sup> beneficial as carefully as record.<sup>46</sup> The Board will also pierce the corporate veil, as it has on numerous occasions, to determine whether a control relationship exists requiring its approval.<sup>47</sup> Voting trusts not created under the Board's supervision will be rejected as a means of control.<sup>48</sup> Nor will the division of stock ownership among different individuals negate Board jurisdiction if there is an intention, or a substantial likelihood, that the stock will vote as a unit.<sup>49</sup> Stock options, warrants and convertible notes may also be con-

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<sup>44</sup> See, e.g., Acquisition of Mid-West by Purdue Research Foundation, 14 C.A.B. 851, 856 (1951); Acquisition of China National Aviation Corp. by Pan American Airways Corp., 6 C.A.B. 143, 146 (1944); Pan American Airways, Inc., Acquisition of Aerovias de Mexico, 4 C.A.B. 494, 496 (1943); Pan American Airways, Inc., Acquisition of Aerovias de Guatemala, 4 C.A.B. 403, 405 (1943); Railroad Control of Northeast Airlines, 4 C.A.B. 379 (1943). See also Application of Pan American World Airways, Inc., C.A.B. Order No. E-25416 (July 13, 1967) (2.24% plus substantial debt interest).

<sup>45</sup> Section 413 of the Federal Aviation Act states: "For the purposes of this title, whenever reference is made to control, it is immaterial whether such control is direct or indirect." 49 U.S.C. § 1383 (1964).

<sup>46</sup> See notes 48, 49 *infra*.

<sup>47</sup> See, e.g., Minnesota Enterprises, Inc., C.A.B. Order No. E-24942 (April 4, 1967); RKO General, Inc., C.A.B. Order No. E-24296 (Oct. 17, 1966); Trans Caribbean Airways, Disclaimer, 38 C.A.B. 1198 (1963); Air Freight Forwarder Case, 9 C.A.B. 473 (1948).

The Board will generally treat a holding company as if it were the carrier itself. See, e.g., Air Land Freight Consolidators, Inc., C.A.B. Order No. 69-3-10 (Mar. 4, 1969); American Express Co., Operating Authorization, 31 C.A.B. 118 (1960); Air Freight Forwarder Case, 9 C.A.B. 473 (1948), *supra*; American Export Airlines, Inc., Acquisition of TACA, 3 C.A.B. 216 (1941).

Where the relationship appears to be harmless, the Board may disclaim jurisdiction, e.g., Transportation Corp. of America, C.A.B. Order No. E-19939 (Aug. 22, 1963); Studebaker Corp., Disclaimer, 37 C.A.B. 738 (1962).

<sup>48</sup> See, e.g., American Airlines, Inc., C.A.B. Order No. E-25759 (Sept. 29, 1967); New York Airways, Inc., C.A.B. Order No. E-24406 (Nov. 15, 1966); Watson-Wilson *et al.*, C.A.B. Order No. E-23115 (Jan. 11, 1966); West Coast Airlines, Inc., Enforcement Case, 42 C.A.B. 561 (1965); Mercury Service Systems, Control Relationships, 42 C.A.B. 847 (1965); Allegheny Airlines, Enforcement Proceeding, 41 C.A.B. 743 (1964); Maytag, Interlocking Relationships, 40 C.A.B. 161 (1964); Trans World Air., Control by Hughes, 32 C.A.B. 1363 (1960); Seaboard & Western, Agreements, 32 C.A.B. 1322 (1960); Atlas Corp., Interlocking Relationships, 31 C.A.B. 1 (1960).

<sup>49</sup> See, e.g., Eastern-Colonial Control Case, 20 C.A.B. 629 (1955). Family members are almost automatically treated as a unit, e.g., Los Angeles Air Service, Inc., Control and Interlocking Relationships, 26 C.A.B. 43 (1957).

sidered as contributing to a control relationship.<sup>50</sup> Moreover, any steps significantly increasing preexisting control, even if already approved, will require additional prior approval.<sup>51</sup>

When stock ownership exceeds ten percent it appears that under Public Law 91-62, the Board may feel obliged to take an even stricter view of control than in the past. Prior to the enactment of Public Law 91-62, the Board had been able to find, without hearing, that ownership interests greater than ten percent did not constitute control.<sup>52</sup> In *REA Holding Corp.*,<sup>53</sup> a case arising after the amendment, the Board found that, because of the presumption of section 408(f), a ten percent and a twenty-five percent stockholder each held controlling interest in the air carrier, even though a management group held another forty-five percent. This presumption, the Board found, must be conclusive in the absence of a "full evidentiary record."<sup>54</sup>

Two other Board decisions under Public Law 91-62 suggest a more restrictive policy. In *Flying Tiger Line, Inc.*,<sup>55</sup> and *Airlift International, Inc.*,<sup>56</sup> cases involving the creation of its own parent by an air carrier, the Board found it necessary to assert jurisdiction under Public Law 91-62, despite the carrier's argument that no change of substance was taking place. Noting that it had previously disclaimed jurisdiction over such transactions,<sup>57</sup> the Board pointed out:

However, with the passage of Public Law 91-62, effective August 5,

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<sup>50</sup> In *South Pacific Airlines, Inc.*, 27 C.A.B. 250 (1958), the Board declined to decide whether an option constituted control under the facts of the case. However, in *Pan American-National Agreement Investigation*, 31 C.A.B. 198 (1960), the Board found that a plan of reciprocal leases with stock options constituted control. And in *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381 (1948), the Board found that notes convertible into stock added to control. In an earlier proceeding the Board had approved Toolco's ownership of 45% of TWA's stock; however, the Board decided that the issuance to Toolco of the new notes required further approval since, if converted, Toolco would own 67% of TWA's stock. See also *Atlas Corp., Interlocking Relationships*, 31 C.A.B. 1 (1960) (stock, including warrants, placed in trust pending divestiture).

<sup>51</sup> *Petition of Ling-Temco-Vought, Inc.*, C.A.B. Order No. 68-9-86 (Sept. 20, 1968); *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (1950); *Pan American-Panagra Agreement*, 8 C.A.B. 50 (1947).

<sup>52</sup> In *Columbia Export Packers*, 41 C.A.B. 773 (1964), the Board held that a 15% interest did not constitute control where 76.3% was in the hands of another person.

<sup>53</sup> C.A.B. Order No. 70-7-142 (July 30, 1970). See note 41, *supra*.

<sup>54</sup> *Id.* at 4; such a record had not been made because the relief was sought, and granted, by exemption. See also C.A.B. Order No. 71-2-17 (Feb. 3, 1971), setting control question for hearing.

<sup>55</sup> C.A.B. Order No. 69-12-121 (Dec. 29, 1969), C.A.B. Order No. 70-6-119 (May 5, 1970).

<sup>56</sup> *Airlift International Inc.*, C.A.B. Order No. 70-6-120 (June 19, 1970).

<sup>57</sup> See, e.g., *Application of United Airlines, Inc.*, C.A.B. Order No. 69-4-67 (Feb. 17, 1969). In the *United* case the Board could have implied jurisdiction on the basis of its prior interpretation of § 408. However, it found that the transaction was not "of substance from the standpoint of the Board's concern of jurisdiction." *Id.* at 2.

1969, Congress in amending section 408 of the Act has indicated its desire that the Board approve the acquisition of control of an air carrier by "any person." Congress indicated its concern with the financial manipulation to which air carriers might be subjected by changes in control, and also with the possibility that air carriers might be diverted by those acquiring control from their principal function as common carriers.<sup>58</sup>

### (b) *Creditor-Debtor Relationships*

Board decisions also declare that a creditor may control an airline solely by virtue of a creditor status<sup>59</sup> or in combination with other relationships.<sup>60</sup> The question whether an airline may be controlled by one of its principal sources of financing, such as a bank or insurance company, has not been reached by the Board.<sup>61</sup> At various times in the past, however, the Board has been urged to assert jurisdiction over these debt relationships on the theory that the lending institution was a person controlling other air carriers or, by lending money to airlines, was engaged in a phase of aeronautics.<sup>62</sup> Sensitive to the broad implications of these conclusions, the Board has thus far managed to avoid the issue.<sup>63</sup>

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<sup>58</sup> Flying Tiger Line, Inc., C.A.B. Order No. 69-12-121 (Dec. 29, 1969); C.A.B. Order No. 70-6-119 (May 5, 1970).

<sup>59</sup> See American Airlines and Trans Caribbean Airways, Inc., C.A.B. Order No. 70-2-108 (Feb. 25, 1970); Hughes Tool Co., C.A.B. Order No. 69-3-113 (March 28, 1969); San Francisco and Oakland Helicopter Airlines, Inc., C.A.B. Order No. E-24376 (Nov. 8, 1966); Toolco-Northeast Control Case, 34 C.A.B. 583 (1961), *aff'd sub. nom.*, National Airlines, Inc. v. C.A.B., 306 F.2d 753 (D.C. Cir. 1962); Transocean-Atlas Case, Interlocking Relationships, 29 C.A.B. 622 (1959). See also C.A.B. Chairman Crooker's letter to the House Committee: "Furthermore, the Board has recognized that control may exist by reason of a debtor-creditor relationship." See, e.g., National Airlines v. C.A.B., 306 F.2d 753 (D.C. Cir. 1962). *House Hearings* 27.

<sup>60</sup> The Board has found control when, in addition to debt, there was management representation or voting stock in trust. See Pan American World Airways, Inc., C.A.B. Order No. E-26762 (May 7, 1968); Northeast Airlines, Cancellation and/or Suspension, 31 C.A.B. 1003 (1960); Seaboard & Western, Agreements, 32 C.A.B. 1322 (1960). But see Alaska Airlines, C.A.B. Order No. E-24078 (Aug. 12, 1966) (debt plus options representing less than 8% of the outstanding shares—no control); Reopened Aerolineas Peruanas S. A., Foreign Permit Case, 31 C.A.B. 181 (1960) (debt to be repaid soon—no control).

<sup>61</sup> A tabulation of the principal sources of debt financing for airlines appears in the ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, tabs. 18, 19 at 118-123, 124-126 (1970).

<sup>62</sup> Such an allegation grew out of litigation over control of TWA by Hughes Tool Co. but the Board never had to decide the issue. See *Hughes Tool v. Metropolitan Life*, 38 C.A.B. 1147 (1963).

<sup>63</sup> In recent years, airline financings have sometimes involved leases from banks which, for investment tax credit purposes, have taken title to the aircraft. In such cases, the bank has been found to be a person engaged in a phase of aeronautics. See *Trans World Airlines, Inc.*, C.A.B. Order No. E-25929 (Nov. 6, 1967); cf. *George E. Keck and United Air Lines, Inc.*, C.A.B. Order No. E-23037 (Dec. 27, 1965); *Charles H. Tillinghast & Trans World Airlines, Inc.*, C.A.B. Order No. E-24892 (May 24, 1967). However, the question of control of other carriers by such institutions has not been raised.

A lending institution, however, clearly comes within the term "any other person."<sup>64</sup> The question is now presented whether the Board will review relationships between airlines and their principal sources of debt capital to determine on the facts of each case whether control exists. Prior decisions suggest that control will be found when there is substantial dependence by an airline on a single creditor,<sup>65</sup> or when the terms of the loan agreement, or a default thereunder, place the creditor in a position to exert substantial influence upon the airline.<sup>66</sup> Under these standards the clear possibility now exists that the CAB could, for the first time, play a significant role in the major airline financings.

### (c) *Management Control*

If anyone controls an airline, presumably its principal officers do. Prior to Public Law 91-62, however, questions of management control did not arise under section 408 because of the largely parallel coverage of section 409 of the Federal Aviation Act.<sup>67</sup> That section prohibits an air carrier from having as an officer or director a person who is an officer, director, or holds a controlling stock interest in any other common carrier or phase of aeronautics. Cases have arisen under section 408, however, involving management assistance agreements, the Board finding that participation in management in an advisory capacity may amount to control.<sup>68</sup> This is illustrated by a recent order involving a consulting contract between TWA and Air Siam.<sup>69</sup> Under the agreement, the Board found that "the TWA advisors will serve primarily as con-

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<sup>64</sup> References to creditor control appear in the legislative history but shed little light on the intent of Congress. Several times during the House Hearings, Congressman Pickle raised the question of control by financial institutions, *see, e.g., House Hearings* 12, 24. The Board's responses, however, were narrow and dealt only with stock pledged in conjunction with financing. *Id. See also House Hearings* 29.

The reference to "capital" as well as "voting securities" in § 408(f) appears to have no significance on the question of creditor control. During the hearings, some witnesses expressed concern that use of the term "voting stock or capital" in connection with this language might be interpreted as referring to "all the assets or property of the corporation" including debt. Letter from SEC, 115 Cong. Rec. 7519, 7520 (daily ed. July 2, 1969). *See also Senate Hearings* 64. However, after first expressing the same concern, *Senate Hearings* 57, C.A.B. Chairman Crooker wrote to the Senate Committee pointing out that the term was already embodied in § 407 and was designed to cover unincorporated air carriers. *Senate Hearings* 132. This appears to be the basis upon which it was retained in the Senate bill.

<sup>65</sup> *See Meteor-Metropolitan Case*, 26 C.A.B. 596 (1958); *American Airlines DC-6 Aircraft Syndicate*, C.A.B. Order No. E-13092 (Oct. 24, 1958); *Arthur Vining Davis, Enforcement Proceeding*, 24 C.A.B. 832 (1957).

<sup>66</sup> *See New York Airways, Inc.*, C.A.B. Order No. E-23713 (Feb. 16, 1966); *Hertz Rent-A-Plane System, Enforcement*, 31 C.A.B. 41 (1960).

<sup>67</sup> 49 U.S.C. § 1379 (1964). Relationships through representatives or nominees are also forbidden without prior CAB approval.

<sup>68</sup> *Trans World Airlines, Inc., and Ethiopian Airlines, Inc.*, C.A.B. Order No. E-24605 (Jan. 5, 1967); *Pan American Acquisition of LACSA Case*, 35 C.A.B. 343 (1962).

<sup>69</sup> *Trans World Airlines, Inc., and Varan Air Siam Air Co., Ltd.*, C.A.B. Order No. 71-2-13 (Feb. 3, 1971).



sultants and will be under the direct supervision and control of Air Siam's Board of Directors and senior management, and that TWA will have no stock or other investment interests in Air Siam."<sup>70</sup> Nevertheless, the CAB observed that:

The advisory personnel will be responsible, to a certain extent, for the formulation of Air Siam's management policies and will become substantially involved in the overall operations of that carrier. When the relationships are considered in light of the fact that Air Siam is a newly formed carrier in its initial stages of operations, the instant agreement would tend to indicate that the achievement of a viable operation by Air Siam may be bottomed, to a substantial degree, on the TWA advisory and technical assistance and Board approval of the arrangements.<sup>71</sup>

The Board went on to find: "On the basis of the foregoing considerations, we conclude that the advisory and assistance relationships may well constitute control by TWA of the foreign air carrier . . . ."<sup>72</sup> In the light of such views the amended section 408 poses the question whether the Board will assert jurisdiction over management changes not covered under section 409, and, if so, what advisors or other persons will be regarded as management.

Here again, the legislative history tells little. Nevertheless, the probability that Congress intended to confer broad new jurisdiction in this area seems remote. Since section 409 has been the primary vehicle for Board jurisdiction over management relationships, it is reasonable to assume that, had Congress intended that the Board supervise management control by "any other person," it would have amended that section.<sup>73</sup> Because of the broad implications of a contrary view, it would be useful for the Board to disavow explicitly any claim of jurisdiction.

(d) *Control through other business relationships.*

Control may exist through relationships other than that of stockholder, creditor, manager or advisor. The Board has found that a lessor

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<sup>70</sup> *Id.* at 3.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> The question of management changes came up briefly in the Senate Hearings and the Board's response makes clear that it had no desire to get into the business of reviewing personnel changes:

Senator COTTON. 'Shouldn't there be provision made so that when there is an ouster or there is about to be an ouster of the experienced management of an airline, with new management to be substituted, you be notified and have opportunity before the change is made to determine whether such new management is fit, willing and able to do the job?'

Mr. CROOKER. 'Senator, there was some discussion that the Board study this. It was felt, I think, that as far as officers were concerned, the directors of the corporation should be in position to take management steps without requiring Board approval.'

*Senate Hearings* 25.

may control his lessee when the relationship is one of substantial dependence by the lessee.<sup>74</sup> More recently, the Board has noted control relationships growing out of agreements by one carrier to replace the air service of another. These agreements generally have involved air taxis taking over an uneconomic service of a larger carrier. Such agreements generally result in the air taxi relying heavily on the larger carrier for certain supporting services, such as reservations and ground handling; and these agreements sometimes give the larger carrier the right to veto certain actions.<sup>75</sup>

In all these cases, the existence of control appears to rest principally on relationships involving substantial dependence by the air carrier. The theory stems from a view to which the Board has often paid its respects—the power to influence may be the power to control, and hence subject to section 408.<sup>76</sup> Without some retreat from this view, all persons in a position to exercise substantial influence over air carriers are in danger, however unwittingly, of violating the Act and subjecting themselves to its penalties.

3. *Under the amended section 408, may an air carrier acquire control of "any other person" without prior approval?*

The language of section 408(a)(5) prohibits the acquisition of an air carrier by a common carrier but not the acquisition of a common carrier by an air carrier. For more than 20 years, however, the Board

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<sup>74</sup> Meteor-Metropolitan, 26 C.A.B. 596 (1958). See also, Pan American-National Agreement Investigation, 31 C.A.B. 198 (1960).

<sup>75</sup> Mohawk Airlines, Inc. Air North, Inc., C.A.B. Order No. 70-2-23 (Feb. 6, 1970); Allegheny Airlines, Inc.-Pocono Airlines, Inc., C.A.B. Order No. 69-3-42 (Mar. 11, 1969); Allegheny Airlines, Inc.-Henson Aviation, Inc., C.A.B. Order No. E-26836 (May 24, 1968); Eastern Airlines, Inc.-Pennsylvania Commuter Airlines, C.A.B. Order No. 68-10-35 (Oct. 8, 1968).

<sup>76</sup> An oft-quoted passage from the examiner's initial decision in the Eastern-Colonial Control Case, 20 C.A.B. 629, 634-35 (1955), reveals the broad reach accorded the term "control":

In ascertaining the existence of control of one company by another, it is clear that control is an issue of fact which must be determined from a broad consideration of the special circumstances of each case; that control may be exercised in other ways than through a vote of the stock of the corporation sought to be controlled; that control does not depend upon the ownership of any specific quantum of stock or other ownership rights but rather represents the amount of power and influence necessary to give one company actual domination or substantial influence over another; that power over another company's stock through affiliates, through close business associates with the same interests, or power over stock holdings exercised in combination with other factors bearing pressure upon the company sought to be dominated may spell corporate control; and that, while there is no technical meaning of control apart from that accorded the term in ordinary usage, the term 'control' embraces every form of control and may cover a wide variety of situations of fact. In short, it has been consistently held that the term 'control' is not an absolute or unqualified concept but rather is one which involves the act or the power of direction or domination under many varied circumstances.

has held that its jurisdiction extends to both types of transactions.<sup>77</sup>

This interpretation must now be examined in relation to the revised section 408. If, by implication, the language forbids air carriers from acquiring control of common carriers, does it now also forbid air carriers from acquiring control of "any other person"? In short, must prior Board approval be obtained before an air carrier can acquire any subsidiary?

The possibility that Public Law 91-62 would be so interpreted appears to have never occurred to its framers. Yet, unless the Board is prepared either to withdraw a previous interpretation of section 408, or make distinctions between common carriers and "other persons" which the language of the statute does not, approval prior to acquisition of a subsidiary could be required. Of the two alternatives, the first would appear to be the more defensible. The logic of the statute has always been at odds with the Board's claim of reverse jurisdiction,<sup>78</sup> and that theory becomes even more questionable under the revised language of section 408.<sup>79</sup>

4. *What tests will be used by the CAB in granting or withholding approval of control by "other persons"?*

Section 408(b) requires that the Board disapprove a control rela-

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<sup>77</sup> Air Freight Forwarder Case, 9 C.A.B. 473, 504 (1948). Within the last year, that view has been reasserted by the Board:

Thus, section 408 is directed to common control relationships, and the Board would be exalting form over substance were it to hold that the acquisition of an air carrier by a person controlling a surface carrier was within its jurisdiction, but that the acquisition of a surface carrier by a person controlling an air carrier was not. The Board, therefore, has construed the jurisdictional provisions of section 408(a) in such fashion as to permit it to assert jurisdiction over all common control situations between the various types of carriers so that it may apply the public interest standards of the section in accordance with the policy of the Act. Assuming that we have correctly interpreted the coverage of section 408(a)(5), the first proviso of section 408(b) is plainly applicable both in terms and in spirit to common control relationships irrespective of whether the technical acquisition is by the air carrier or the surface carrier. Trans America Corp., C.A.B. Order No. 70-9-54 at 8 (Sept. 10, 1970).

<sup>78</sup> The original purpose of Congress was to avoid domination of an infant air transportation industry by powerful surface carriers, not vice versa. See generally Allen, *supra* note 5. Where Congress was concerned about who an air carrier acquired, it said so. Thus § 408(a)(5) specifically prohibits air carriers from acquiring control of other air carriers. Section 408(a)(6) specifically prohibits an air carrier from acquiring control of a person engaged in a phase of aeronautics. Section 408(a)(6) could easily have mentioned common carriers as well as persons engaged in a phase of aeronautics, had Congress intended to preclude such acquisitions by air carriers. See 49 U.S.C. § 1378 (1964), *as amended*, (Supp. V, 1969).

<sup>79</sup> For example, new § 408(f) speaks in terms of 10% of the voting securities or capital "of an air carrier." To be consistent with its previous rulings, the Board must now find either that the section 408(f) applies to acquisitions of a common carrier despite the plain language, or that it applies to all acquisitions covered by 408(a)(5) except acquisitions of a common carrier. See 49 U.S.C. § 1378 (1964), *as amended*, (Supp. V, 1969).

tionship that is not in the "public interest." Despite the breadth of that term,<sup>80</sup> the Board has generally confined its concern to the possible anti-competitive effects of a proposed acquisition.<sup>81</sup> Unrelated factors, such as the applicant's business experience, motives and reputation, have generally been ignored. Furthermore, control relationships have usually been approved when the Board found no adverse effects on competition, or could qualify its approval with conditions precluding substantial transactions between the controlled entities.<sup>82</sup>

Considering the reasons behind enactment of Public Law 91-62, the Board's previous view of the term "public interest" as used in section 408 needs to be reexamined. For example, it could be concluded from the legislative history that gamblers or racketeers, foreign interests and perhaps conglomerates are not meant to be acceptable as controlling persons even if no anti-competitive effects are indicated. To what extent is the Board bound by this legislative history? With what characteristics of fitness should the Board be concerned? Assistant Secretary Cherington highlighted the problem in his testimony before the Senate Committee:

In considering the acquisition's consistency with the public interest the Board should not attempt to weigh all the imponderables associated with the acquirer's anticipated management of the carrier but should confine its review narrowly to the purchaser's capacity to fulfill the responsibilities imposed by the applicable certificates of public convenience and necessity. Beyond this determination, only two substantive issues appropriately warrant scrutiny: the effect of the acquisition on competition in air transportation and foreign control. We would urge this committee to make clear in any report on S. 1373 that it anticipates that the Board will interpret the legislation narrowly along these lines rather than expansively.<sup>83</sup>

The Committee did not include such language in its report. Never-

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<sup>80</sup> Section 102 of the Federal Aviation Act, 49 U.S.C. § 1302 (1964), lists a number of factors which give content to the term. However, it specifically provides that the public interest considerations enumerated therein are not exclusive.

<sup>81</sup> This first proviso of § 408(b) provides "[t]hat the Board shall not approve any . . . acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the acquisition of control." 49 U.S.C. § 1378 (1964).

<sup>82</sup> See the cases collected in note 5, *supra*. In other instances the Board has approved on an interim basis common control of adjoining or competing carriers pending a decision on a merger or other long term solution where one carrier was in financial distress. *Id.* See also Air Freight Forwarder Investigation, C.A.B. Order No. 69-4-100 (Apr. 21, 1969), *aff'd sub. nom.*, ABC Air Freight v. C.A.B., 419 F.2d 154 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970) (various relationships between surface carriers and air freight forwarders approved and disapproved); Capitol Airways, Inc., C.A.B. Order No. 68-12-74 (Dec. 13, 1968) (control of phase of aeronautics/air taxi by trunk carrier approved); Cook Cleland *et ux.*, Control-Interlocking Relationships, 11 C.A.B. 295 (1950) (common control of phase of aeronautics and "large irregular" air carrier approved).

<sup>83</sup> Senate Hearings 41-42.

theless, nothing said by the Board with respect to Public Law 91-62 before, or since, its enactment indicates a disposition contrary to the approach suggested by Secretary Cherington. Thus, while it is difficult to forecast the response to a particular control application, in all probability the Board will avoid unduly subjective inquiries and limit its concern to those facts tending to show that the proposed acquisition may have a clear, direct and substantial adverse effect upon the ability of an air carrier to perform its certificated services.

*C. The prospects for more certainty and procedural simplicity.*

As noted above, the Board's far reaching concepts of control, combined with the legislative history of Public Law 91-62, create precisely the kind of uncertainty that led the agency to oppose the type of bill that was enacted. Countless actions that were once clearly outside the statute now fall in a vast gray area where the only guideposts are cases decided under a different statute with different objectives. Had it taken the advice of the Board and the Department of Transportation, Congress could have avoided most of these uncertainties. Its failure to do so, however, does not require those affected to operate in a zone of perpetual twilight. The CAB advice was rejected, but its processes were not immobilized.

*1. Rulemaking*

The Board has extensive inherent,<sup>84</sup> as well as explicit,<sup>85</sup> power to act by rulemaking when control is involved. Under section 408, however, the Board has, up to now, acted primarily by adjudication. This approach is now more questionable than ever. The accretion of Board decisions has tended to build up theories of control with obsolete or legally questionable credentials. Theories involving control of, or by, surface carriers obviously need a general reexamination now that air transportation has matured. So does the Board's tendency to equate influence with "control" in a statutory sense. The problems of reconciling these earlier views with the Board's new jurisdiction simply intensify a need for reexamination. That need is too broad and too immediate for the case-by-case approach. As the Board's testimony pointed out, investors, managers, and others on whom airlines depend for their development must be able to act with reasonably certain knowledge of what the law requires of them. Rulemaking can shed far more light far more quickly than adjudication.

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<sup>84</sup> See generally note 91, *infra*.

<sup>85</sup> Section 204 of the Federal Aviation Act, 49 U.S.C. § 1324(a) (1964). See, e.g., 14 C.F.R. § 299.2 (1970), exempting air carriers from §§ 408(a)(2), (3) of the Federal Aviation Act insofar as the provisions relate to the purchase or lease of aircraft from another air carrier or person engaged in a phase of aeronautics. See also 14 C.F.R. § 399.19 (1970), setting forth standards for § 408 approval of wet leases to foreign air carriers.

(a) *Statutory Interpretation by Rule*

Part 399 of the Board's Regulations contains several illustrations of how the Board may state its views on questions of statutory interpretation in the absence of a specific case.<sup>86</sup> There is no reason why some of the vexing questions which arise out of Public Law 91-62 cannot be dealt with in this manner.

(b) *Disclaimer of Jurisdiction by Rule*

As previously noted, the Board has sometimes elected not to pierce the corporate veil in situations involving indirect control. In such instances, rather than approve the transaction, it has declined to take jurisdiction.<sup>87</sup> Public Law 91-62 creates new opportunities for the Board to decline to take jurisdiction with respect to remote relationships that did not concern Congress, and should not concern the Board. Jurisdiction in these matters should be disclaimed in advance.

(c) *Exemption by Rule*

As revised by Public Law 91-62, section 408(a)(5) contains new authority permitting the Board to exempt any acquisition of control of a non-certificated air carrier (such as an air taxi or air freight forwarder). This power has thus far been used in a number of specific cases.<sup>88</sup> It should be possible to define the cases where such exemptions would be granted routinely and to do so in advance by rule.

Under section 416 of the Federal Aviation Act,<sup>89</sup> the Board may also exempt air carriers from most of the provisions of Title IV, including section 408. The Board has used this power to grant a blanket exemption for certain sales and leases covered by section 408(a)(2) and (3).<sup>90</sup> Exemptions under section 416 can only be granted when the acquiring party is an air carrier but this authority would be useful should the Board find that section 408(a)(5) should be inverted to preclude acquisitions of control by air carriers of "any other person."

<sup>86</sup> See, e.g., 14 C.F.R. § 399.92 (1970): "The Board interprets section 409 of the Federal Aviation Act of 1958, as amended, as making unlawful, unless approved by order of the Board, interlocking relationships between an air carrier and a person controlling another air carrier."

<sup>87</sup> See note 47, *supra*. It will be noted that disclaimers occur only in instances where intervening corporate entities distinguish the relationship from those literally covered by the statute. The Board does not assert the right to decline or to take jurisdiction in the latter situations.

<sup>88</sup> See, e.g., John D. Betz, C.A.B. Order No. 70-6-136 (Jun. 24, 1970); Surf-Air, Inc., C.A.B. Order No. 70-4-85 (Apr. 17, 1970); Golden Gate Enterprises, Inc., C.A.B. Order No. 70-4-17 (Apr. 3, 1970); Enterprise Shipping Corp., C.A.B. Order No. 70-2-11 (Feb. 4, 1970); Universal Air Freight Corp., C.A.B. Order No. 70-1-156 (Jan. 30, 1970); Military Purchase System, Inc., C.A.B. Order No. 69-11-83 (Nov. 19, 1969); Prinair, Inc., C.A.B. Order No. 69-11-5 (Nov. 4, 1969). The Board can always provide for termination of a blanket exemption in any particular case where, upon individual examination of the facts, it appears warranted. See, e.g., 14 C.F.R. § 299.4 (1970).

<sup>89</sup> 49 U.S.C. § 1386 (1964).

<sup>90</sup> 14 C.F.R. § 299.2 (1970). See note 85, *supra*.

#### (d) *Approval by Rule*

Despite specific language in section 408 calling for a hearing, it may be possible for the Board to grant approvals without hearing if it acts by rule. The courts appear to be receptive to the notion that the requirements of adjudicatory proceedings are not applicable if the agency acts with respect to an entire class.<sup>91</sup> This alternative could be useful in disposing of some of the new relationships placed under Board jurisdiction when there are no substantial reasons for withholding approval.

#### 2. *Expedited Adjudicatory Proceedings*

Some cases will not be susceptible to disposition by rule. The alternative, however, need not be lengthy periods of uncertainty while the parties to executory acquisitions trudge through prehearing conferences, hearings, briefs to the examiner, petitions for review, briefs to the Board, oral argument, *etc.* "Show cause" procedures can be used in certain circumstances.<sup>92</sup> In addition, the Board can establish special hearing procedures allowing for a reasonably prompt decision.<sup>93</sup> Under Subparts "M" and "N" of its procedural regulations, the Board has accomplished this for certain types of certificate amendment cases.<sup>94</sup> Similar procedures could be established for cases under section 408 involving acquisitions by "any other person."

#### 3. *Post Facto Approval*

Finally, the Board still has the power to allow parties to consummate transactions before the hearing. Traditionally, the Board has asserted that section 408 requires prior approval. In the oft-cited *Sherman* case,<sup>95</sup> the Board announced that it would not approve acquisitions already consummated unless the parties first restored the status

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<sup>91</sup> See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Bi-Metallic Investment Co. v. Colorado*, 239 U.S. 441 (1915). See also *American Airlines v. C.A.B.* 359 F.2d 624 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 843 (1966). *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889 (D.D.C. 1965).

<sup>92</sup> The Board has made extensive use of show cause procedures in lieu of hearings under 49 U.S.C. § 1371 (1964) (certificate awards) and 49 U.S.C. § 1376 (1964) (mail rates). More detailed hearing requirements of section 408(b) coupled with the special procedures set forth in the third proviso have not prevented the Board from using show cause procedures in unusual circumstances involving control *pendente lite*. *American Airlines, Inc. & Trans Caribbean Airways, Inc.*, C.A.B. Order No. 70-2-43 (Feb. 11, 1970); *Hughes Tool Co.*, C.A.B. Order No. 69-3-11 (Mar. 5, 1969).

<sup>93</sup> In merger cases, the Board has consistently taken the view that the parties, whose futures are in part frozen until the Board decides the case, are entitled to expedited action. Similar reasons apply to acquisitions of control.

<sup>94</sup> 14 C.F.R. §§ 302.1301-15, 1401-15 (1970). These proceedings apply to certain restriction removal situations. No prehearing conference is held; evidence is submitted in written form with the application or answer; oral testimony is generally prohibited; and time periods for all steps are shortened materially.

<sup>95</sup> *Sherman, Interlocking Relationships*, 15 C.A.B. 876 (1952).

quo ante. The statute, however, says nothing about prior approval, and the *Sherman* doctrine, which was not applied even in the case which fathered it, has been waived on numerous occasions since then to permit post facto approval.<sup>96</sup> As the Board's frequent *Sherman* waivers make clear, there is nothing inherently wrong with after-the-fact approval. Indeed, there would seem to be a definite advantage to the Board and the parties in identifying areas where approval would generally be routine and allowing completion of the transactions, provided an application is submitted to the Board at the same time. The harm to the public or parties in those few cases where after-the-fact hearings might lead to disapproval would be more than outweighed by numerous situations where transactions were facilitated instead of delayed.

#### D. CONCLUSION

The dangers of hasty legislative action dealing with immediate problems are nowhere better illustrated than in Public Law 91-62. With the passage of time, the concerns that prompted this urgent enactment have become more obscure while its unforeseen ramifications have become more clear. It is doubtful whether in today's climate this legislation would receive as fast or as favorable treatment as it did. Nevertheless, it is now the law, and those who ignore it, or misread its meaning, do so at some risk.

As shown above, several things can be done, short of repealing or amending Public Law 91-62, to make it work sensibly. Despite Congress' insistence that the Board have more substantive and less procedural discretion than it asked for, there remains a substantial array of options for defining the law and shortening procedures. In administering other sections of the Act, the Board has shown that it can use these options imaginatively and aggressively. No area under CAB supervision is more in need of jurisdictional pruning and procedural innovation than the administration of the new section 408. That can happen if the CAB will apply its substantial skills to the tools at hand.

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<sup>96</sup> See, e.g., *Aerovias Sud Americana, Sherman Doctrine Waiver*, 42 C.A.B. 855 (1965); *Allegheny Airlines, Enforcement Proceeding*, 41 C.A.B. 743 (1964). In *National Airlines, Inc., & Lewis B. Maytag, Jr., Interlocking Relationships*, 40 C.A.B. 161 (1964), the Board stated the following concerning the question of prior approval: "The Board may waive the doctrine when it appears that had the parties realized the relationship was subject to the Board's jurisdiction, they would have filed a timely application for approval."

Research fails to disclose a single instance where the *Sherman* doctrine was specifically applied.



